In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

THE HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,
Petitioner,

v.

EDDIE THOMAS, *et ux.*,
Respondents.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

Petitioner has raised the federal questions in this cause for the first time on its motion for a rehearing as there was no occasion for raising them until after the decision of the Supreme Court, because it has relied upon the adjudicated cases and the rule of Stare Decisis. This was timely under the decision in the case of *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107.* The necessity for raising this question arose when the Supreme Court rendered a decision in this cause wholly dis-

regarding a consistent interpretation of the statute, which had become a rule of property, by the Supreme Court and the Intermediate Appellate Courts of Texas over a period of fifty years. These interpretations by the Court of the statute have been made over this period of years in the light of the fact that the statute was twice re-enacted and twice amended by the legislature without a change material to this controversy. Up to this time, not a single case can be found where the land owner had the right to withdraw the award of the commissioners and still prosecute his appeal. Under this statute as it existed in 1895, the following cases arose and each held against the landowner's right to withdraw the award and still prosecute his appeal. *Fort Worth Ice Co. v. Twombley, 31 S. W. 81; Fort Worth Ice Company v. C. R. I. & P. R. Co., 33 S. W. 159.* As the statute then existed if the landowner refused to accept the award, the Condemnor could not go into possession, so in 1899 the statute was amended to permit the Condemnor to deposit double the amount of the award, give bond as security for costs, and it could then go into possession.

The next decisions following the precedent set by the above decisions and interpreting the Act of 1899, appears in 1904 in the case of *Parks v. Dallas Terminal Ry. & Union Depot Co., 78 S. W. 533.* The Legislature in 1911 re-enacted what is now Article 3268 in the same terms and again in 1919 the Court followed the same precedent in the case of the *City of Rosebud v. Vitek, 210 S. W. 728.* The Supreme Court of Texas dismissed an application for writ of

error in this case. Again the statute was re-enacted in 1925 and in 1926 in *Texarkana and Ft. Smith Ry. Co. v. Brinkman, 288 S. W. 852*, the Court again reiterated that "The Appellee (landowner) could not have accepted the deposit and received the same without abandoning his appeal." This case was reviewed by the Supreme Court of Texas and affirmed in *292 S. W. 860*. The statute was amended in 1931 and in 1934, which merely had the effect of exempting municipal corporations from making double the deposit and bond for costs. In 1937 the Courts again construed Article 3268 to the effect that the landowner could not withdraw the award and prosecute his appeal. See *Hopkins v. City of Dallas, 106 S. W. 2d 783*. The Court there said,

> "To accept the benefits of a judgment while prosecuting an appeal to have it set aside as erroneous is clearly an instance of such inconsistency, giving him, in case of reversal, an undue advantage over his antagonist, and embarrassing the proceedings in the Trial Court."

The Supreme Court of Texas refused a writ in the *Hopkins* case, which means under the Texas rule that it is equivalent to the Supreme Court of Texas itself writing or approving the opinion. *Heinatz v. Allen, 217 S. W. 2d 994*.

The first time where any withdrawal of deposited fund was allowed appears in the case of *Brazos River Conservation and Reclamation District v. Allen, 166 S. W. 2d 388*. In that case the Condemnee did not appeal and was satisfied. In that decision the Court clearly made the distinc-

tion of the landowner accepting or appealing in the following language:

> "If, under such circumstances, the landowner accepted the award, that would mark the end of the controversy so far as he would be concerned and he could not prosecute an appeal."

To the same effect is the *Housing Authority of the City of Dallas v. Dixon, 250 S. W. 2d 636.* There the Court said:

> "The cases cited by Appellant where the owner of the land condemned was Appellant or appealing party are not in point. Here Appellees are not appealing from or complaining of the judgment of the County Court, they are willing to abide by and are seeking to sustain it."

Thus we see that the Supreme Court of Texas has by judicial decree overruled all the previous holdings, including its own decisions, upon which Condemnor has relied by depositing the money into Court and has been guided thereby to find itself now in a grave position of disadvantage, and particularly because it has thirty similar such cases pending. Similarly this same situation was reviewed by the Supreme Court of the United States in the case of *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673*, where the Supreme Court of Missouri had consistently interpreted a tax statute to the effect that it was not necessary to exhaust administrative remedies before a Court of equity would interfere with an illegal or discriminatory assessment. When Plaintiff in the above case reached the Supreme Court of Missouri, it reversed

itself and for the first time held that it was necessary to exhaust the administrative remedies before resorting to a court of equity for relief in identical cases. But the time had elapsed for such administrative remedies and therefore the Plaintiff found itself being deprived of a day in court or a chance to be heard. The Supreme Court condemned such an action and held that by judicial interpretation of a statute the rights of the Plaintiff were violated, it being denied rights under the Fourteenth Amendment of the United States Constitution, and particularly the due process provisions thereof. So it is in the case before the court. Condemnor, the Petitioner, in reliance upon an unbroken line of adjudicated cases approved by re-enactments by the Legislature, had deposited the money into the registry of the Court (the amount of the commissioners' award) in order to go into possession with the assurance of the previous adjudication of the Court, including the Supreme Court of Texas, that the money would not be withdrawn and dissipated by the landowner unless the landowner by withdrawing the award abandoned his further prosecution or appeal of the case. As a result, the Condemnor is left without effective remedy to recover any excess which has been withdrawn by the landowner. The Supreme Court of Texas had held in the case of *B. B. B. & C. R. R. Co. v. Ferris, 26 Tex. 588,* that an eminent domain statute which provided that the landowner would recover a general judgment for the value of his land and damages which he had to enforce by general execution was unconstitutional as not complying with what is now Art. 1, Sec. 17 of the Texas

Constitution as not assuring certain and sure payment. But now under this holding, if the Condemnor succeeds in reducing the award, it will get a general judgment which is enforceable only by execution if the former landowner is still solvent. The Petitioner, having deposited the money in this and thirty other cases in which the Courts have allowed the deposit to be withdrawn, now finds itself in a position of suffering the loss in each case in which the award is reduced. Had the declared law been otherwise it could have protected itself by not making the deposit and litigating first to a final judgment and paid the exact amount due then. The change here in the decision of the Court is not one of *procedure* but is *one of abolishment* by judicial decree of a property right. This property right of the Condemnor had been fixed *not only by the Courts previous interpretations*, but by successive re-enactments by the Legislature and subsequent re-interpretation by the Supreme Court of Texas.

Article 3268 provides that when there is an appeal from the award of the commissioners, the case stands for trial as any other case, and in the event of an appeal to a higher court after trial in the court of first instance, it is governed by the same rules as other cases. By an unbroken line of decisions, the Supreme Court of Texas has approved holdings of inferior courts that a person cannot take the fruits of a judgment and still prosecute his appeal. *Dunham v. Randell & Chambers, 32 S. W. 720; Harper v. Foster, 40 S. W. 40; Cameron v. Hinton, 92 Tex. 492, 49 S. W. 1047.*

Yet, in the face of the express language of the statute, the Supreme Court of Texas in this case holds that the landowner can take the fruits of a judgment and still prosecute his appeal. Particularly is the result of the decision in this case erroneous because this is a proceeding in rem so that the landowner is literally in the position of appropriating the subject matter of the litigation with the blessing of the court and still litigate for more. If he gets more, the Condemnor must pay before he can get title to the land. If he gets less, the Condemnor can recover the money only if the Condemnee is solvent. Is this a just result?

Considering the judicial interpretation of the statute by the several Intermediate Appellate Courts and the Supreme Court itself, the Legislature has clearly indicated its acceptance of this judicial construction by its acquiescence in such construction over a period in excess of fifty years. It is therefore strongly urged that the doctrine of stare decisis overrides all the considerations when the Supreme Court of Texas overturned all the adjudicated cases dealing with the issue involved. The argument is perhaps best stated by Justice Brandeis in the well-known quotation from his dissenting opinion in *Di Santo v. Pennsylvania, 273 U. S. 34, 42 (U. S. Supreme Court 1927)*, with which dissenting opinion Mr. Justice Holmes concurred:

> "It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legis-

> lation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of *stare decisis* teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity."

While appellate courts may differ in their attitudes regarding the weight to be accorded the doctrine of stare decisis, it is firmly believed that an appellate court exceeds its judicial function when it overrules statutory construction decisions of long standing, because those decisions have become as much an integral part of the statute as if they were originally written into it. This principle is supported by numerous authorities cited under the following statement from 21 Corpus Juris Secundum, pages 388-390:

> "The doctrine of stare decisis applies with full force to decisions construing statutes or ordinances. In fact, when a statute has been judicially construed by the highest court having jurisdiction to pass on it such construction is as much a part of the statute as if plainly written into it originally, unless such construction will affect contract or property rights. However, while such decisions should not be disturbed unless there are cogent reasons for holding that the former construction was erroneous, the rule is not so absolutely fixed as to preclude the overruling of decisions which are plainly erroneous.
>
> "*Effect of acquiescence.* This rule is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the

> legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature."

The first Texas Supreme Court in a statutory construction case very aptly set forth this doctrine in the following language:

> "The rule of *stare decisis*, so far as it applies to decisions of our own court, should not be disregarded, but on the fullest conviction that the law has been settled wrong; and even then we should pause and consider how far the reversal would affect contracts and transactions entered into and acted upon, under the law of the Court." *Sydnor v. Gascoigne, 11 Texas 449, 455 (Texas Supreme Court 1854)*, (Opinion by Justice Lipscomb).

The latest reaffirmation of this attitude of the Texas Supreme Court regarding the great weight to be given the principle of stare decisis in statutory construction cases is in *Thompson v. Kay, 77 S. W. 2d 201, 207-208 (Texas Supreme Court 1934)*, (Opinion by Justice Greenwood). Another recent forcible statement of the doctrine is found in *Baten v. Thornhill, 145 S. W. 2d 608, 611 (Beaumont Court of Civil Appeals 1940, writ ref'd)*, (Opinion by Justice Walker).

Very strong statements of this principle are also found in the opinions of the United States Supreme Court. See *Missouri v. Ross, 299 U. S. 72, 75 (U. S. Supreme Court 1936)*, (Opinion by Justice Sutherland); *Gulf, Colorado &*

Santa Fe Railway Company v. Moser, 275 U. S. 133, 136 (U. S. Supreme Court 1927), (Opinion by Justice McReynolds).

It is strongly urged that the rule of stare decisis enunciated above should be adhered to in this case because it lends itself to a continuation of settled law, preserves the integrity of orderly procedure, of contracts, and acts of parties in reliance thereupon.

The Supreme Court of Texas and the inferior appellate courts, whose judgments are reviewed or reviewable by the Supreme Court, have established the guaranties of adequate compensation to the land owner (condemnee) by holding:

(1) That the title to real estate cannot be divested out of the condemnee unless and until, concurrently with its divestiture, the condemnor pays in cash to him the amount of damages finally adjudicated. (See *City of San Antonio v. Astoria, 67 S. W. 2d 321.)*

(2) That the property owner has a lien on the property condemned to secure his payment. (See *City of Laredo v. Benevides, 25 S. W. 482.)*

(3) That where the property owner appeals, he cannot withdraw the money from the registry of the court, under which deposit the condemnor has taken possession, without abandoning his appeal, but that he is entitled to the legal rate of interest from the date of possession. (See *City of Rosebud v. Vitek, 210 S.*

W. 728, and *Texarkana & Fort Smith Ry. Co. v. Brinkman, 288 S. W. 852, affirmed by S. Ct. 292 S. W. 860.)*

(4) That wherever the money, adjudged as the sum due is deposited and the land owner has withdrawn the money, it has been treated as full satisfaction and further appeal becomes moot. (See *Hopkins v. City of Dallas, 106 S. W. 2d 783; Parks v. Dallas Terminal & Ry. & Union Depot Co., 78 S. W. 533*, and *Fort Worth Ice Co. v. Twombley, 31 S. W. 81.)*

(5) That when an appeal is filed from the award of the condemnation commissioners, the case stands on the docket for trial as any other civil case, and that the appeal can be most informally written (See *Fitzgerald v. City of Dallas, 34 S. W. 2d 682).*

(6) That when an appeal is filed from the award of the condemnation commissioners, the trial results in a trial de novo and the award is nullified, so that as in this case the award was nullified and the amount deposited represents a tender in full. (See *Kennedy v. City of Dallas, 201 S. W. 2d 840.)*

(7) That an eminent domain statute, which does not absolutely guarantee payment to the property owner has been declared void in the case of *B. B. B. Ry. Co. v. Ferris, 26 Tex. 588.* In that case, the eminent domain statute provided that a property owner will be paid by a general judgment for the value of his land and damages, enforceable only by execution.

The Supreme Court held this to be violative of what is now Art. 1, Sec. 17 of the Texas Constitution, and not absolutely guaranteeing payment to the condemnor.

To the above is now added the right to withdraw the money (the award) and still litigate the value and damages for land taken.

As a necessary result of the judgment of the Supreme Court of Texas in this case, in contrast, the condemnor's rights and remedies are as follows:

1. In the event it desires to go into possession pending litigation on appeal, it must deposit into the registry of the court the amount of the award, regardless of how exorbitant it is, which the condemnee has the right to withdraw (the res of the litigation) and take its chances of recovering the excess upon final adjudication by a general judgment with a precarious chance of collecting it.

2. In case of abandonment of the condemnation proceedings, which the condemnor has the unquestioned right to do up to a certain stage of the proceedings *(City of Sherman v. Williams, 296 S. W. 663)*, if the condemnee has withdrawn and dissipated the deposit, then it can of course get a general judgment which it may or may not be able to collect.

3. In cases where it is finally adjudicated that the condemnor lacks the power to condemn and went into possession and the condemnee has withdrawn the deposit and

dissipated it, then in that event the land itself is returned to the owner, but for the deposit which has been appropriated by the condemnee, condemnor has only a general judgment which may or may not be enforceable.

In each of these cases it is quite apparent that the condemnee has been unjustly enriched at the expense of the condemnor. When it is considered that the landowner has absolute protection and assurance of being paid before he is divested of title, it is clear that the condemnor has no assurance or certainty that it will recover its money from the condemnee in either of the cases above mentioned.

WHEREFORE, PREMISES CONSIDERED, your Petitioner respectfully submits that the writ of certiorari should be granted and upon final hearing that the judgment of the Supreme Court of Texas be reversed and that of the trial court and the intermediate appellate court be affirmed.

Respectfully submitted,

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